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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 46.

SOUTHERN CONSTRUCTION COMPANY, INC., and
CONTINENTAL CASUALTY COMPANY,
Petitioners,

vs.

UNITED STATES for the Use of SAMUEL J. PICKARD,
d/b/a PICKARD ENGINEERING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR THE PETITIONERS.

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Rule 13 (a) 1, 2, 3, 4-5, 6

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QUESTION PRESENTED AND STATEMENT OF THE CASE.

The real question here presented for determination by this Court is whether or not the compulsory provisions of Rule 13 (a) of the Federal Rules of Civil Procedure apply to a situation where the plaintiff has brought two separate suits against a single defendant in two separate jurisdictions and on two separate contracts.

We cannot believe that it was one of the beneficent purposes of the Federal Rules of Civil Procedure, including Rule 13 (a), to deprive a defendant of the right to defend against such separate suits in accordance with the facts underlying payments and in complete disregard of the principles of equity and justice.

It is the contention of petitioners that Rule 13 (a) was never intended to apply to a fact situation as presented by this record, and that in fact Rule 8 (c) of the Federal Rules of Civil Procedure would allow the Court "on terms, if justice so requires," to "treat the pleading as if there had been a proper designation," which in this instance involves simply the defensive plea of payment.

The only deliberate action taken under the facts before this Court was the deliberate act of the respondent in first filing all of his suits in the Georgia Court, which had no jurisdiction of the Tennessee claims, and thereafter on its own initiative respondent, the **plaintiff** in the Trial Court, separated its claims and filed a separate suit in the Tennessee court. Requiring petitioners under such circumstances to litigate all of their defenses in the Georgia case and stand silent in the Tennessee case subsequently filed by the respondent, is on its face illogical and inequitable.

Respondent quotes the Advisory Committee note at the time Rule 13 (a) was amended in 1948, which shows the real purpose of Rule 13 (a) was to prevent **"bringing an independent action in another court"** by a party having a claim (Respondent's Brief, p. 12). No independent action has been brought by the petitioners in this cause within the purview of the Advisory Committee note. On the contrary, a second action was instituted by the respondent in Tennessee, not by petitioners, who were seeking to assert their defenses to the separate suits filed by respondent.

STATUS OF THE RECORD.

Respondent's brief begins and ends on the theme that petitioners may still have another available remedy by reasserting in the Georgia case the item of $35,000, which is the real subject matter of the litigation here involved. Respondent has gone so far as to attach as Appendices B, C, and E, the action taken in the Georgia suit subsequent to the rendition of the decision by the Sixth Circuit Court of Appeals.

His plea to this Court seems to be that even though the Sixth Circuit Court of Appeals may be wrong in its application of Rule 13 (a), nevertheless petitioners should be required to reassert this claim in the Georgia case, to go to the expense of litigating the matter before a jury in the Georgia case, and to subject itself to a possible appeal in the Georgia case, perhaps even up to this Court. Furthermore, since the decision by the Sixth Circuit, respondent has obtained judgment in the Tennessee case, and the trial Judge has granted a stay of execution but has required petitioners to post a bond to protect the judgment as handed down by the Sixth Circuit. To require petitioners to litigate for another year, or perhaps two years, in the Georgia action, with the premium expense of such a bond, is unnecessary and unjust, when a ruling favorable to petitioners by this Honorable Court construing Rule 13 (a), would vacate such judgment and eliminate such expense to your petitioners.

Respondent ends his brief with the suggestion that this Court will feel that current developments in the Georgia proceedings "have rendered this appeal moot".

Petitioners most earnestly submit that this is misleading, inequitable, and unjust, and is not a matter of record before this Court. Respondent has seen fit to include as ap-

pendices and in his argument matters of pleading in the Georgia case filed subsequent to the rendition of the decision by the Sixth Circuit, but he has completely failed to point out to this Court that on August 4, 1962, **respondent's associate counsel in Georgia asked that the pre-trial hearing and the trial in Georgia be delayed until the Tennessee case was decided by the Supreme Court.** (See Appendix A attached hereto.)

In one breath in the Georgia case respondent asks for delay until the matter can be heard in this Honorable Court; in the next breath he asks this Court to consider the issue moot since pleadings have been filed to protect this item in the Georgia Court in the event of an adverse ruling by this Honorable Court.

Furthermore, it is evident from the legal position taken by the respondent before this Court, that should the decision of the Court of Appeals be affirmed respondent will take the legal position in the Georgia case that since Southern deleted the item from the Georgia case upon the filing of the Tennessee suit by the respondent, it is now res adjudicata and cannot now be asserted in the Georgia case. Such an issue in the Georgia case could conceivably be litigated through the Circuit Court of Appeals and ultimately would again be before this Court for decision. The petitioners earnestly submit that they are entitled to have the issue determined now so as to avoid such delay, uncertainty and expense.

The mere fact that petitioners have amended their pleadings in the Georgia case to protect against a possible affirmance of the Sixth Circuit, should not prevent them from receiving a full measure of justice in the Tennessee case, which is before this Court for decision. Indeed, the ruling of the Sixth Circuit Court of Appeals is not only unjust and inequitable as to these petitioners, but is a matter of such import in the application of Rule

13 (a) of the Federal Rules of Civil Procedure, that it should not be allowed to stand as a part of the case law of the United States and thereby encourage additional litigation by plaintiffs under similar fact circumstances as are here involved.

This is a case of first impression and we respectfully submit that a ruling by this Court is not only urgently required to do justice to the rights of the petitioners, but is of great import in the proper interpretation and application of one of the very important rules of Federal Civil Procedure, designed to promote justice, the speedy determination of legal issues, and the elimination of technical issues such as are here involved.

We cannot believe that is the purpose of Rule 13 (a) to allow a plaintiff to file a suit and thereafter at his discretion delete a part of his initial suit, file it elsewhere, and thereby deprive the defendant of the right to defend the second suit on its facts.

The basic purpose and spirit of Rule 13 (a) is to prevent multiplicity of litigation. The petitioners here have not multiplied litigation. Only the respondent has done so.

It is undisputed that upon the trial of the Georgia case respondent introduced sworn exhibits listing all of the payments made by petitioner Southern at Fort Benning. Respondent did not include this $35,000 payment (R. 109, 474; P. Ex. 32, R. 22-23); nor did petitioner Southern. Respondent, on the contrary, stood silent and made no contention at the trial of the Georgia case that this item was a compulsory counterclaim in the Georgia case, even though respondent had full knowledge of this payment and all of the circumstances surrounding it, including even a copy of the check mailed by Southern to respondent's supplier.

In both the Georgia case and the Tennessee case the respective District Judges ruled that respondent, as a matter

of law, was not entitled to recover against your petitioner. Respondent at the time of the trials in Georgia and in Tennessee was insolvent. The payment of the $35,000 is asserted in the Tennessee case as an affirmative defense, and no affirmative judgment over against respondent is sought.

Under such circumstances the compulsory provisions of Rule 13 (a) do not apply, but Rule 8 (c) does apply.

Respectfully submitted,

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APPENDIX A.

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Fred R. Martin
(1890-1949)

August 4, 1962

Hon. W. A. Bootle
United States Judge
Federal Building
Macon, Georgia

Dear Judge Bootle:

Re: Pickard Engineering Company vs
Southern Construction Company
Civil Action No. 652
Columbus Division

This will acknowledge receipt of your letter of August 2 addressed to all counsel with reference to a proposed pretrial conference for 2:30 P. M. on August 10 in Macon.

As you know, in the companion case in the Middle District of Tennessee, the trial judge held that the $35,000.00 payment to Atlas could be used as a counterclaim to the Tennessee suit, but this ruling was reversed by the Sixth Circuit Court of Appeals, which held that this payment was a compulsory counterclaim in the Columbus suit. A judgment was then taken in the Tennessee trial court for the amount of indebtedness to Pickard by Southern found by the jury without allowing any credit for this payment.

Thereafter, Southern filed a petition in the Supreme Court of the United States for certiorari to review the Sixth Circuit decision, and certiorari was granted and the case is to be argued in and decided by the Supreme Court.

It occurs to me that no satisfactory trial of the counterclaim in the Columbus case can be had until the Supreme Court renders its decision. If the Supreme Court should reverse the Sixth Circuit decision and reinstate the trial court judgment, then Southern would have acquired full benefit of the $35,000.00 payment and would not be entitled to make any claim for it in the Columbus suit. On the other hand, if the Sixth Circuit decision should be affirmed by the Supreme Court, then naturally Southern would want to claim the entire $35,000.00 payment in the Columbus counterclaim.

It therefore is my suggestion that the pretrial conference and the trial itself should be stayed until a decision has been rendered by the Supreme Court. In view of these circumstances, it is my belief that opposing counsel would concur in this suggestion. I am sending copies of this letter to them with the request that they immediately notify the court and me of their wishes in this connection.

Yours very truly,

George C. Grant.

GCG/mh

cc: Mr. Howell Hollis,
Mr. Robert Norman,
Mr. Harry McCowen,
Mr. Edward Gallagher.